

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KING C. LUM,	)	Civ. NO. 06-00068 SOM/BMK
	)	
Plaintiff,	)	ORDER AFFIRMING MAGISTRATE
	)	JUDGE'S ORDER DENYING
vs.	)	PLAINTIFF'S MOTION TO COMPEL
	)	DISCOVERY
KAUAI COUNTY COUNCIL, et al.,	)	
	)	
Defendants.	)	
_____	)	

ORDER AFFIRMING MAGISTRATE JUDGE'S  
ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY

On April 20, 2006, Plaintiff King C. Lum ("Lum") filed a motion to compel discovery from Defendant Kauai County Council (the "Council") of the minutes of Executive Session 177 ("ES 177 minutes"). The Council asserts that the ES 177 minutes are protected under the attorney-client privilege. Relying on a review conducted by the State of Hawaii's Office of Information Practices ("OIP"), Lum claims that only a portion of the ES 177 minutes are protected under the attorney-client privilege. Lum also contends that the ES 177 minutes should be made public pursuant to Haw. Rev. Stat. § 92-1. On May 10, 2006, Magistrate Judge Barry M. Kurren filed his Order Denying Plaintiff's Motion to Compel ("Order"). After careful consideration of Lum's appeal and an in camera review of the ES 177 minutes, this court AFFIRMS Magistrate Judge Kurren's Order.

STANDARD OF REVIEW

A magistrate judge's order can be reversed by the district court only if it is "clearly erroneous or contrary to law." See 28 U.S.C. § 636(b)(1)(A). The threshold of the "clearly erroneous" test is high. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (stating that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"); Thorp v. Kepoo, 100 F. Supp. 2d 1258, 1260 (D. Haw. 2000) (noting that the clearly erroneous standard is "significantly deferential, requiring a definite and firm conviction that a mistake has been committed").

DISCUSSION

The purpose of the attorney-client privilege is to encourage clients to candidly communicate with their attorneys so that the attorneys are sufficiently well-informed to provide sound legal advice. United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978). The attorney-client privilege therefore protects confidential communications between attorneys and clients. See Upjohn Co. V. United States, 449 U.S. 383, 395-96 (1981). The Ninth Circuit has explained when the attorney-client privilege applies:

(1) Where legal advice of any kind is sought  
(2) from a professional legal advisor in his  
capacity as such, (3) the communications  
relating to the purpose, (4) made in  
confidence (5) by the client, (6) are at his  
instance permanently protected (7) from  
disclosure by himself or by the legal  
advisor, (8) except the protection be waived  
. . . .

Landof, 591 F.2d at 38 (quoting 8 John Henry Wigmore, Evidence  
§ 2292 (McNaughton rev. 1961)). In the context of closed city  
council meetings, the attorney-client privilege cannot be  
asserted simply because legal counsel is present. See N.  
Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1127  
(N.D. Cal. 2003). The privilege exists only when the  
communications between legal counsel and the client are "related  
primarily to the seeking of legal advice." Id. at 1128.

Lum contends that the ES 177 minutes should be made  
public pursuant to Chapter 92 of the Hawaii Revised Statutes,  
which requires government agencies to hold public meetings. See  
Haw. Rev. Stat. § 92-1. Lum claims that in closing the ES 177  
meeting to the public, the Council did not meet the requirements  
of sections 92-4 and 92-5.<sup>1</sup> See Plaintiff's Appeal of Magistrate  
Judge's Order Denying Plaintiff's Motion to Compel Discovery at

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<sup>1</sup> Under the Hawaii Revised Statutes, a government agency may  
hold an executive meeting closed to the public pursuant to  
section 92-4. See Haw. Rev. Stat. § 92-4. Such meetings are  
limited to matters enumerated in section 92-5, including  
consulting "with the board's attorney on questions and issues  
pertaining to the board's powers, duties, privilege, immunities,  
and liabilities." See Haw. Rev. Stat. § 92-5.

20 (May 10, 2006). Lum is relying on an OIP opinion letter dated April 14, 2005, which states that the Council appears to have violated Hawaii statutes in conducting the ES 177 meeting out of the hearing of the public. Id.

The issue before the court is whether Magistrate Judge Kurren clearly erred in finding the ES 177 minutes protected under the attorney-client privilege. After reviewing the ES 177 minutes in camera, the court finds no clear error. See City of Pacifica, 274 F. Supp. 2d at 1128. Magistrate Judge Kurren had a basis for finding that the test for the existence of the attorney-client privilege set forth in Landof, 591 F.2d at 38, was satisfied here. Accordingly, the Magistrate Judge's Order is affirmed.<sup>2</sup>

This court recognizes that the OIP opined that only a portion of the minutes fell under the attorney-client privilege, and that any such portion could be redacted. Having reviewed the minutes, the court is not left with a definite and firm conviction that the Magistrate Judge clearly erred in finding the entirety of the minutes privileged. Magistrate Judge Kurren either disagreed with OIP or concluded that the privileged portions were so intertwined with the other portions that

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<sup>2</sup> Lum also asks the court to order the Council to produce a privilege log that includes the ES 177 minutes. The Council states that it intends to produce that privilege log. The Council is directed to produce a privilege log pursuant to Rule 26(b)(5) of the Federal Rules of Civil Procedure without delay.

redaction was impractical. Neither conclusion was a clear error by the Magistrate Judge.


Conclusion

The Court AFFIRMS the Magistrate Judge's Order Denying Plaintiff's Motion to Compel.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, June 6, 2006.



  
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Susan Oki Mollway  
United States District Judge

King C. Lum v. Kauai Count Council, et al., Civil No. 06-00068 SOM/BMK; ORDER AFFIRMING MAGISTRATE JUDGE'S ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY.